RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 9658 preempts the ten-year period of repose in N.C. Gen. Stat. § 1-52.

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INTRODUCTION

Congress passed CERCLA to ensure that parties responsible for releasing hazardous wastes into the environment from a facility would bear the costs of cleaning up the environment. To further this goal, section 9658 of CERCLA replaces the commencement date of state limitations periods that begin before plaintiffs "knew (or reasonably should have known)" of their property damage with a "federally required commencement date" that begins when plaintiffs "knew (or reasonably should have known)" of their property damage. The question here is whether the "federally required commencement date" affects all state limitations periods that begin before plaintiffs knew or should have known of their harm, including absolute repose periods. As demonstrated by both the plain language and legislative purpose of section 9658, the answer is yes.

STATUTORY PROVISIONS INVOLVED

Section 9658 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9658, provides, in pertinent part:

Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

> (1) Exception to State statutes — In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for

such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable — Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

. . .

(b) Definitions — As used in this section—

. . .

(2) Applicable limitations period — The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date — The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general — Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have

> known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

North Carolina General Statutes, § 1-46, "Periods prescribed," provides:

> The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article.

North Carolina General Statutes, § 1-52, "Three years," provides, in pertinent part:

> Within three years an action –
>
> . . .
>
> (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
>
> . . .
>
> (16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

STATEMENT

A. The terms "statutes of limitation" and "statutes of repose"

Traditionally, statutes of limitation began to run from the wrongful act or omission complained of, without regard to when the harmful consequences were discovered. *See, e.g., Shearin v. Lloyd*, 98 S.E.2d 508, 512 (N.C. 1957). As a result of the harsh results possible from such a rule, jurisdictions began to adopt versions of the "discovery rule" by which statutes of limitation did not begin to run until a plaintiff had discovered the harm. *See, e.g., Ballenger v. Crowell*, 247 S.E.2d 287, 293 (N.C. Ct. App. 1978). In response to the discovery rules, some jurisdictions also placed absolute time limits in their statutes of limitation on when actions may be brought. *See Hinkle v. Henderson*, 85 F.3d 298, 302 (7th Cir. 1996) ("probably all statutes of repose . . . are surgical strikes by the legislature against the discovery rule").

When section 9658 was enacted in the 1980s, courts often used the term "statute of repose" to refer to such a "*portion of a statute of limitation* that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or a cause of action." Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 583 (1981) (emphasis added). Such portions of statutes of limitation are "more precisely referred to as a period of repose." *See Black v. Littlejohn*, 325 S.E.2d 469, 474 (N.C. 1985).

Through the 1980s, this Court used the term "statute of limitations" to refer to periods of repose. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v.*

Gilbertson, 501 U.S. 350, 362 n.8 (1991) (referring to three-year repose period as "a portion of an express statute of limitations"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976) (referring to "statute of limitations" with discovery provision and three-year absolute repose provision); *see also Harding v. K. C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992) (stating "the United States Supreme Court makes no distinction between statutes of limitations and statutes of repose").

Congress has never used the term "statute of repose" or "repose" when referring to a period of repose that caps the time within which an action may be brought. To this day, Congress places such provisions within "statutes of limitations" or other headings using the term "limitation." *See, e.g.*, 15 U.S.C. § 78u-6(b)(iii)(1)(aa) (creating repose provision under heading "Statute of limitations"); 18 U.S.C. § 1514A(b)(2)(D) (same); 42 U.S.C. § 2278 (same); 49 U.S.C. § 20109(d)(2)(ii) (same). *See also In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1063 n.5 (C.D. Cal. 2012) ("Congressional statutes continue to use the term 'statute of limitation' to encompass statutes of repose.").

B. CERCLA section 9658

In 1980, Congress enacted CERCLA in response "to serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA was meant to ensure that those "actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions.'" *Id.* at 55-56 (quoting S. Rep. No. 96-848, at 13 (1980)).

Congress also established a twelve-member study group to review "the adequacy of existing common law and statutory remedies." 42 U.S.C. § 9651(e). The study group had three members each from four different legal associations: the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General. *Id.* § 9651(e)(2). The study group's members included a retired Chief Judge of the New York Court of Appeals, two sitting and one former State Attorneys General, three law professors, and several attorneys in private practice. *See* Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies; A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group" at unnumbered inner page (1982) (hereafter "Study Group Report"). Congress directed the study group to evaluate "barriers to recovery posed by existing statutes of limitations" and "explicitly address the need for revisions in existing statutory or common law." 42 U.S.C. §§ 9651(e)(3)(F), (e)(4)(A).

The study group submitted its report to Congress in July 1982. The Study Group Report repeatedly noted that injuries from hazardous wastes have long latency periods. Study Group Report at Reporter's Introduction ("extended latency periods"), 8 ("15 to 20 years"), 16 ("long latency periods"), 17 ("latent injuries"), 28 ("long latency periods, sometimes 20 years or longer"), 31 ("long latency periods"), 55 ("ten-to-forty year latency period"), 116 ("personal injuries are often latent for many years"), 240 ("thirty years or more"), 242 ("effects may not manifest themselves

until 20 or 30 years later"), 244 ("long latency periods"), 245 ("long latency periods"), A-3 ("15 to 20 year latency period"), B-1 ("The injuries caused by hazardous waste disposal are often latent, or delayed in manifesting themselves."), L-17 (adverse health effects, including cancer, "may not appear until twenty to forty years after exposure"), L-20 ("latency periods of 20 to 30 years or more").

Due to these long latency periods, the Study Group Report concluded that "[c]ommencement of the running of the statute of limitations can be a barrier to recovery." *Id.* at 28. A rule that statutes of limitation begin to run when a plaintiff is exposed to hazardous substances, rather than from discovery of harm, "will defeat most actions before the plaintiff knows of his injury." *Id.* The study group determined that the barrier to recovery posed by limitations periods could be reduced if states adopted a discovery rule. *Id.* at 117. Accordingly, under the heading "Statutes of Limitation," the Study Group Report recommended "that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the disease and its cause." *Id.* at 241. The Report specified that "[t]he Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claims before he knows that he has one." *Id.*

The Study Group Report also contained a "State-by-State analysis" of existing "statutes of limitation" in all 50 states, the District of Columbia, the Virgin Islands, and Puerto Rico. *Id.* at Appendix B-6. In that analysis, entitled "Statutes of Limitation applicable to

actions arising out of hazardous waste disposal," the study group consistently used the term "statute of limitation," whether referring to the period in which a claim can be brought as measured from accrual or from the occurrence of the event that caused the injury. *See id.* at B-6 to -10 (describing parts of Connecticut, Kansas, and North Carolina statutes).

The study group criticized absolute repose provisions. As to Connecticut's statute of limitations, for example, which includes the repose provision that "no such action may be brought more than three years from the date of the act or omission complained of," the study group stated:

> The present law is not, however, completely favorable to victims of toxic waste induced personal injuries. In many such cases, the plaintiff will not have sustained, nor would the prudent person have discovered his injury within three years after the culpable act.

Id. at B-7. Similarly, as to a repose provision in the Kansas statute of limitations, the study group stated:

> The statute would not protect a plaintiff with a particularly slowly developing injury, because it provides that "in no event shall the period be extended for more than ten years beyond the time of act giving rise to the cause of action."

Id. at B-8.

Although six of the twelve study group members submitted separate comments disagreeing with certain aspects of the Study Group Report, not one disagreed with the need for a liberal discovery rule. *See id.*, Part 1, Comments. Indeed, the Report stated:

> There has been general agreement that the discovery rule should apply to claims for injuries growing out of exposure to hazardous wastes because of long latency periods common for such injuries. Thus, the statute of limitations for such a claim should begin to run only when the injured party knows, or should know in the exercise of reasonable discretion, that he has suffered an injury.

Id. at L-1.

In response to the Study Group Report, in 1986 Congress amended CERCLA by enacting 42 U.S.C. § 9658, entitled, "Exception to State statutes." Subsection (a) contains an express preemption clause, which may apply to "any action . . . under State law for personal injury, or property damages . . . caused or contributed to or by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility." 42 U.S.C. § 9658(a)(1). In such actions, if the "applicable limitations period . . . provides a commencement date . . . earlier than the federally required commencement date, [then] such period shall commence at the federally required commencement date." *Id.*

Congress defined "applicable limitations period" as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." 42 U.S.C. § 9658(b)(2). "Commencement date" is defined as "the date specified in a statute of limitations as the beginning of the applicable limitations period." 42 U.S.C. § 9658(b)(3). The "federally required commencement date" is a discovery rule defined as "the date the plaintiff knew (or reasonably should have known) that the personal in-

jury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4).

Combining these definitions, the federally required commencement date applies in any action when the period in a state statute of limitations in which the action may be brought begins before the plaintiff knew or should have known that his injury was caused or contributed to by a hazardous substance covered by CERCLA.

The accompanying House Conference Report stated that section 9658 "provides for a Federal commencement date for State statutes of limitations which are applicable to harm which results from exposure to a hazardous substance." H.R. Conf. Rep. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. Echoing the Study Group Report's concerns and language, the House Conference Report stated that:

> In the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury—rather than from the time when the party "discovers" that his injury was caused by the hazardous substance or pollutant or contaminant concerned.
>
> The study done pursuant to Section 301(e) of CERCLA by a distinguished panel of lawyers noted that certain State statutes deprive plaintiffs of their day in court. The study noted that the problem centers around when the statute of limitations begins to run rather than the number of years it runs.

> This section addresses the problem identified in the 301(e) study. . . . [A] Federally-required commencement date for the running of State statutes of limitations is established.

Id.

C. North Carolina's limitations statute

Article 5 of the North Carolina General Statutes, entitled "Periods Prescribed," sets forth "[t]he periods prescribed for the commencement of actions, other than for the recovery of real property." N.C. Gen. Stat. § 1-46. Section § 1-52, entitled "Three Years," states a three-year statute of limitations for breach of contract, torts, and certain other causes of action. *See Adams v. Nelson*, 329 S.E.2d 322, 325 (N.C. 1985) (noting Court of Appeals applied "G.S. 1-52, the statute of limitations for breach of contract actions"); *Danielson v. Cummings*, 265 S.E.2d 161, 162 (N.C. 1980) (defendants asserted "the action was barred by the three-year statute of limitations, G.S. 1-52"). Subsection 16 of section 1-52 sets forth a discovery rule that causes of action for personal injury or property damage do not accrue until bodily harm or physical property damage becomes apparent or reasonably ought to have become apparent, "Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Subsection 16 thus fixes a ten-year period in which causes of action for bodily harm or physical property damage "may be brought." *Hodge v. Harkey*, 631 S.E.2d 143, 145 (N.C. Ct. App. 2006). The ten-year period begins to run at the last act or omission of the defendant, not at the discovery of harm. *Id.* at 146.

While lower courts have referred to provisions such as subsection 16 as a "statute" of repose, "[t]his outer limit is more precisely referred to as a *period* of repose." *See Black*, 325 S.E.2d at 474 (emphasis added); *see also Doe v. Doe*, 973 F.2d 237 (4th Cir. 1992) (repeatedly referring to the second sentence in subsection 1-52(16) as a "10-year period of repose").

D. Proceedings below

Petitioner CTS Corporation (CTS) is a successor to CTS of Asheville, Inc., which manufactured electronic parts at the Mills Gap Road Electroplating Facility, in the Skyland community of Buncombe County, North Carolina. Pet. App. 51a-52a; Fourth Cir. Jt. Appx. 21. The corporation used various toxic solvents, including trichloroethylene (TCE), cyanide, chromium VI, and lead. Pet. App. 51a. CTS operated the facility until November 1985. Pet. App. 53a. In 1986 or 1987, CTS placed the facility and surrounding land for sale, representing that the site "has been rendered in an environmentally clean condition." *Id.* In December 1987, CTS sold 54 acres of the industrial site to a general partnership and provided specific warranties that the property was free of environmental contamination. *Id.* 53a-54a.

Respondents are individuals who live on or near the property formerly owned by CTS and who have been and continue to be exposed to toxins left behind by Respondents via contact from water, air, and land. *Id.* 54a, 56a. On November 23, 2009, the United States Environmental Protection Agency (EPA) advised Respondents David Bradley and Renee Richardson that their well water contained startlingly high levels of TCE and was not fit for human consumption. *Id.* 55a-56a. TCE is a manmade solvent that is persis-

tent, highly mobile, and carcinogenic. *See, e.g.*, Fourth Cir. Jt. Appx. 174; Environmental Protection Agency, EPA/635/ R-09/011F, Toxicological Review of Trichloroethylene 1-1, 4-635 to 4-637 (2011). The EPA has concluded that the groundwater contamination is at least partially due to CTS. Fourth Cir. Jt. Appx. 174. Although the EPA and CTS entered into an "Administrative Order on Consent for Removal Action" in late 2003 to early 2004, *id.* 190-221, there has never been a removal action or a remediation of the site.

On February 22, 2011, less than two years after the EPA notification, Respondents sued CTS for nuisance in the United States District Court for the Western District of North Carolina, invoking the court's diversity jurisdiction. Pet. App. 48a. CTS moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that N.C. Gen. Stat. § 1-52(16) barred Respondents' complaint. Fourth Cir. Jt. Appx. 37, 41-42. In response, Respondents contended that their action was timely, based in part on 42 U.S.C. § 9658. *Id.* 118-19, 258-62.

Finding that the last act or omission of CTS occurred in 1987, Pet. App. 44a, the magistrate judge recommended that the action be dismissed, reasoning that section 9658 preempts only the "state accrual date in environmental cases," *id.* 46a, and also that statutes of limitation and statutes of repose are two distinct types of statutes, one procedural and one substantive. *Id.* 47a. The district court then granted CTS's motion to dismiss, in a short opinion concluding that the plain language of section 9658 applies only to state "statutes of limitations, not statutes of repose." *Id.* 37a-38a.

The Fourth Circuit reversed, holding that the discovery rule articulated in section 9658 preempts North Carolina's ten-year limitation. *Id.* 2a. With one judge dissenting, the court stated that section 9658 could be read to apply only to statutes of limitation because it does not use the term "statutes of repose," *id.* 12a; however, applying the plain language of subsection 9658(a)(1) and the definitions in subsection 9658(b), section 9658 can also be read to preempt the ten-year limitation provision in N.C. Gen. Stat. § 1-52(16). *Id.* 12a-13a. The court noted that the use and meaning of the terms "statute of limitations" and "statute of repose" had developed considerably over the years and that historically the terms had often been used interchangeably. *Id.* 13a.

Because the text of section 9658 could be read as either including or excluding "statutes of repose," the court of appeals then looked to other indicia of congressional intent. *Id.* 14a. The court noted that Congress adopted section 9658 to address the problem identified in the Study Group Report, which was "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." *Id.* The court also noted that CERCLA is remedial, that section 9658 resulted from Congress's specific concern with ensuring adequate remedies, and that section 9658 furthers the Act's remedial goals by preempting state limitations periods that would bar causes of action for latent harms. *Id.* 14a-16a. The court concluded that interpreting section 9658 to exclude North Carolina's ten-year statute of repose would "obliterate legitimate causes of action before they exist. . . . precisely the barrier that Congress intended § 9658 to address." *Id.* 15a. Such a reading would thwart Congress's goal of

removing barriers to relief from hazardous substances. *Id.*

SUMMARY OF ARGUMENT

I. The plain wording of section 9658 expressly preempts the North Carolina repose provision. Section 9658 preempts an "applicable limitations period" that provides an earlier "commencement date" than the "federally required commencement date." The repose provision meets the definition of "applicable limitations period" because it provides "the period specified in a statute of limitations during which a civil action . . . may be brought." Generally speaking and under North Carolina law, repose provisions define the period within which an action may be brought. The repose provision is also specified within a statute of limitations. The repose provision's "commencement date," defined as the "beginning" of the period, is when the defendant last acted or failed to act. That commencement date is earlier than the "federally required commencement date," defined as when the plaintiff knew or should have known that the property damage was caused or contributed to by the hazardous substance.

The structure of section 9658(a) supports this conclusion. State limitations periods that have an earlier commencement date are preempted under paragraph (1), while those that do not continue to apply under paragraph (2). Congress's approach demonstrates that it did not carve out repose provisions and leave plaintiffs in some states with a less favorable commencement date.

II. Section 9658 also impliedly preempts the North Carolina repose provision. Congress enacted section 9658 to prevent plaintiffs injured by exposure to haz-

ardous substances released into the environment from a facility from being deprived of their day in court by state statutes that run before the plaintiffs discover the cause of their latent harm. That purpose can be frustrated by either a limitations period without a discovery rule or by a repose period. Both can have the effect of barring plaintiffs' claims before they know they have them, as the study group noted. The study group repeatedly expressed concern about the problem of latent harm from hazardous substances and the importance of a discovery rule, and in enacting section 9658, Congress agreed that individuals with latent harm should not be deprived of relief by limitations periods that begin before discovery.

A uniform trigger date for all state limitations periods would apply equally where environmental contamination crosses state lines and eliminate the incentive for states to pass more restrictive limitations periods to compete for hazardous waste producers. The remedial statutes rule supports reading section 9658 to reach repose provisions, and all the circuits but one have applied that rule in construing CERCLA. Section 9658 is the epitome of a remedial statute, because Congress directed the study group to evaluate barriers to recovery and address the need for revisions in statutory and common law, and then acted on the study group's identification of statutes of limitation that begin to run before latent harm is discovered as the primary barrier to recovery. CTS and the government misread the legislative history and the legislative compromise underlying section 9658, which fully support preemption of all limitations periods with a commencement date earlier than the federally required commencement date.

III. CTS's remaining arguments are unpersuasive. The presumption against preemption does not apply here. The avoidance canon was not raised or reached below, and there is, in any event, no serious concern as to section 9658's constitutionality. Recognizing preemption in this case will affect only claims involving the release of hazardous substances into the environment from a facility. It appears that no state has enacted a "statute of repose" specific to such claims, and that only five states have catch-all repose periods that could apply to such claims. Finally, the government's argument that CERCLA's remedial aim does not extend to tort actions goes against the statute's plain wording and legislative history, and is contradicted by the government's position in a prior similar case.

ARGUMENT

I. SECTION 9658 EXPRESSLY PREEMPTS NORTH CAROLINA'S REPOSE PROVISION.

A. The text of section 9658(a)(1), entitled "Exception to State statutes," provides the best evidence of its preemptive scope. *See, e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2013). Section 9658(a)(1) displaces an "applicable limitations period" that provides an earlier "commencement date" than the "federally required commencement date," as CERCLA defines those three terms. *See supra* p.2. *See also Burgess v. United States*, 553 U.S. 124, 129-30 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Applying CERCLA's defini-

tions, section 9658 preempts the North Carolina repose provision.

First, CERCLA defines the "applicable limitations period" as "the period specified in a statute of limitations during which a civil action . . . may be brought." 42 U.S.C. § 9658(b)(2). Repose provisions by their very nature define the period when an action "may be brought." 54 C.J.S. *Limitations of Action* § 4, at 20-21 (1987) ("statute of repose . . . limits the time within which an action *may be brought*") (emphasis added). More specifically, here, the North Carolina repose provision establishes a ten-year period in which an action for property damages may be "brought." *See, e.g., Boudreau v. Baughman*, 368 S.E.2d 849, 857 (N.C. 1988) ("If the action is not *brought* within *the specified period*," a plaintiff has no cause of action) (emphases added); *Bernick v. Jurden*, 293 S.E.2d 405, 413 (N.C. 1982) ("a statute of repose . . . places a cap or outer limit on *the time period* within which a products liability action *may be brought*") (emphases added); *Hodge*, 631 S.E.2d at 145 ("The plain language of the statute indicates that in cases involving property damage, no cause of action *may be brought* more than ten years after the defendant's last act or omission.") (emphasis added). Furthermore, the North Carolina repose provision is a "period specified in a statute of limitations;" in fact, it is a subsection of a statute of limitations provision, N.C. Gen. Stat. § 1-52. Section 1-52 is located in Chapter 1 ("Civil Procedure"), Subchapter 2 ("Limitations"), and Article 5 ("Limitations, Other Than [Recovery of] Real Property") of the North Carolina General Statutes.

Second, CERCLA defines "commencement date" as "the date specified in a statute of limitations as the

beginning of the applicable limitations period." 42 U.S.C. § 9658(b)(3). (emphasis added). Repose provisions fit smoothly into this definition, as they have a "beginning" tied to a specific event. *See, e.g.*, 54 C.J.S. *Limitations of Action*, § 4, at 20-21 ("the period contained in a statute of repose *begins* when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted") (emphasis added). Here, the "beginning" of the repose period is "the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). Indeed, states with similar repose provisions expressly tie the term "commence" to the defendant's act. *See* Kan. Stat. Ann. § 60-513 ("in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action"); Or. Rev. Stat. § 12.115(1) ("In no event shall any action . . . be commenced more than 10 years from the date of the act or omission complained of.").

CTS argues that repose provisions do not have a "commencement date" because "it simply is not true that 'a civil action . . . may be brought' when a statute of repose begins to run." Pet. Br. 23; *see also* Pet. Br. 24, 43. CTS's mistake, however, is in confusing language from the definition of "applicable limitations period," with the definition of "commencement date." The phrase "a civil action . . . may be brought" is from the definition of "applicable limitations period," not from the definition of "commencement date." *See* 42 U.S.C. §§ 9658(b)(2)-(3). Thus, CTS's argument that the definition of "commencement date" "would not make sense" (Pet. Br. 23) as applied to a repose period fails because the argument is not in fact based on the definition of "commencement date." In addition, CTS excerpts the language "a civil action . . . may be

brought" from the "applicable limitations period" definition, which, as explained above, read in full comfortably applies to repose provisions. *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.").

Third, CERCLA defines the "federally required commencement date" as "the date the plaintiff knew (or reasonably should have known) that the property damages . . . were caused or contributed to by the hazardous substance." 42 U.S.C. § 9658(b)(4)(A). The North Carolina "commencement date" of 1987 is earlier than this "federally required commencement date" of 2009.

The plain language of section 9658, which includes specific definitions of the preemptive scope of subsection (a)(1), covers the North Carolina repose provision in this case. Because the state commencement date under the applicable limitations period is earlier than the federally required commencement date, the federally required commencement date applies here. *See also Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp. 2d 251, 278 (D. Conn. 2003) (the federally required commencement date of section 9658 would clearly preempt Conn. Gen. Stat. §§ 52-577 and 52-584 because their limitations periods begin to run from the date of the act or omission).

B. The structure of section 9658 further shows that section 9658(a)(1) preempts the North Carolina repose provision. *See CSX Transp.*, 507 U.S. at 664 ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue.").

Section 9658(a) applies broadly to "any action brought under State law for personal injury, or prop-

erty damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment." Paragraphs (a)(1) and (a)(2) together address two possibilities as to a "commencement date." First, paragraph (a)(1) applies to "any action" in which the state "limitations period" would provide a "commencement date" that is "earlier than the federally required commencement date." In those cases, the federally required commencement date applies. Second, paragraph (a)(2), which applies to all cases "[e]xcept as provided in paragraph [a](1)," provides that the state "statute of limitations" applies. That is, section 9658(a) comprehensively addresses all state limitations periods, both those with commencement dates earlier than the federally required commencement date (paragraph 1), and those that do not have an earlier commencement date (paragraph 2). The statute is thus crafted to give plaintiffs the benefit of whichever limitations period is better for them. Paragraphs 1 and 2 together suggest that Congress intended comprehensively to address the applicable period during which a claim could be brought. CTS's reading, which would create a third, unaddressed category, would leave injured landowners in a few states (those with applicable repose provisions) in a worse position than those in the others. Paragraphs 1 and 2 together strongly suggest that Congress did not intend this carve out.

Looking beyond the statutory text, the government speculates that Congress may have excluded repose periods from section 9658 because a "statute of repose" is a "substantive" "condition precedent" under North Carolina law. U.S. Br. 27. Yet the government acknowledges that the substantive condition

precedent is "a time period in which suit must be brought." *Id.* (quoting *Boudreau*, 368 S.E.2d at 857). That language parallels the definition of "applicable limitations period" in section 9658, and this parallel supports the plain language reading that section 9658(a) encompasses repose provisions. *See* 42 U.S.C. § 9658(b)(2).

Additionally, even where state-law limitations periods are treated as substantive law, they are subject to preemption by federal law. *See, e.g., Jinks v. Richland Cnty.*, 538 U.S. 456, 464-65 (2003) ("Assuming for the sake of argument that a principled dichotomy can be drawn . . . between federal laws that regulate state-court 'procedure' and laws that change the 'substance' of state-law rights of action, we do not think that state-law limitations periods fall into the category of 'procedure' immune from congressional regulation."); *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 316 n.7 (S.D.N.Y. 2012) (relying on *Jinks* to reject the argument that a federal statute could not "displace state statutes of repose" because they are substantive); *aff'd*, 712 F.3d 136 (2d Cir. 2013); Reply Br. of United States, *Jinks v. Richland Cnty.*, No. 02-258, 2003 WL 547429, at *7 (U.S. Feb. 21, 2003) (contending that Congress may preempt state limitations periods that are inconsistent with valid federal enactments and policies). Thus, the characterization of a repose provision as substantive law should not affect the outcome here. *See also Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 418 S.E.2d 648, 657 (N.C. 1992) ("despite the fact that statutes of repose differ in some respects from statutes of limitations, they are still time limitations"); *Boudreau*, 368 S.E.2d at 862 (Webb, J., dissenting) ("Whatever differences we may find in statutes of lim-

itation and statutes of repose, the purpose of both of them is to bar claims which are not filed within certain times. The majority has not said why there should be a different treatment of them because we call one statute substantive and the other procedural. I do not see why we should.").

C. CTS's arguments based on the text of section 9658 are unavailing. *First*, CTS highlights that section 9658 does not use the terms "statute of repose" or "repose." Pet. Br. 20, 25. But because the definitions in subsection 9658(a) encompass repose provisions, including the word "repose" was unnecessary. Furthermore, there is no textual support for CTS's argument that Congress—despite never having used the term "statutes of repose" in any statute—recognized a dichotomy between "statutes of limitation" and "statutes of repose" and in CERCLA intended to include one and not the other. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 746 (1996) (rejecting petitioner's dichotomy between "interest" and "penalty" where statute used only "interest").

In addition, although Congress has enacted provisions of absolute repose numerous times, it has never used the terms "statute of repose" or "repose" to do so. Congress has instead used "statute of limitations" or other phrases including "limitations" when enacting repose provisions. *See, e.g.*, 15 U.S.C. § 78u-6(b)(iii)(1)(aa) (creating repose provision under heading "Statute of limitations"); 18 U.S.C. § 1514A(b)(2)(D) (same); 42 U.S.C. § 2278 (same); 49 U.S.C. § 20109(d)(2)(ii) (same). Similarly, although there is no dispute that the North Carolina statute establishes a period of repose, it does not use the term

"repose." *See* N.C. Gen. Stat. § 1-52. Nor do the few other state statutes of limitations with general repose provisions that might apply to tort claims based on releases of hazardous substances. *See* Conn. Gen. Stat. § 52-584 (repose provision contained in chapter entitled "Statute of Limitations" and not using term "repose"); Kan. Stat. Ann. § 60-513(b) (repose provision contained in article entitled "Limitation of Actions" and not using term "repose"); Or. Rev. Stat. § 12.115 (repose provision contained in chapter entitled "Limitation of Actions and Suits" and not using term "repose"). Because "the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo," *Landis v. Physicians Ins. Co. of Wis.*, 628 N.W.2d 893, 907 (Wis. 2001), Congress's choice to use "limitations," and not "repose," is unremarkable and consistent with an intent to preempt repose periods such as North Carolina's, as applied to claims concerning injury from hazardous waste.

Second, CTS argues that section 9658 establishes an "accrual" provision, Pet. Br. 26, and the government similarly argues that the section alters only "accrual." *See* U.S. Br. 24. Traditionally, however, "accrual" referred to the starting point for all limitations periods. *See, e.g.*, *Black's Law Dictionary* 835 (5th ed. 1979). Moreover, as discussed above, section 9658 does not use the term "accrual;" it uses the term "commencement date," defined as the "beginning" of the applicable limitations period.

Third, CTS's argument that section 9658 preempts only "one state-law time period," Pet. Br. 24-25, begs the question. The dispute here is how to define that time period. Although CTS would have it otherwise, the repose period is plainly part of the

"state-law time period" in which claims can be brought under North Carolina law. Moreover, the substitution that CERCLA effects is a substitution of the "commencement date," not of a time period. Again, the North Carolina repose provision commences with "the last act or omission of the defendant," which is "a commencement date" that is earlier than "the federally required commencement date" set forth in section 9658(b)(4). Accordingly, CTS's focus on the singular "time period" argument does not help to elucidate the meaning of section 9658. *See also* 1 U.S.C. § 1 (in statutes, the singular includes the plural).

Fourth, although CTS suggests otherwise (Pet. Br. 28-29), contemporaneous dictionaries show that, in 1986, "statute of limitations" did not have a narrower meaning that excluded "statutes of repose." Rather, the dictionaries show that "statute of limitations" had a broad definition that encompassed "statute of repose," which was not yet separately defined. The then-current edition of *Black's Law Dictionary*, for example, under the entry "Limitations," defined "statute of limitations" as:

> Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. .... Also sometimes referred to as "statutes of repose."

Black's (1979), *supra, at* 835. *See also Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) (consulting "[t]he then-current edition of *Black's Law Dictionary*"). Further, not only did *Black's* definition twice conflate the two terms, *Black's* contained no separate definition for "statute of repose." Rather,

under "Repose statutes," *Black's* simply stated: "See Limitation (Statute of limitation)." *Black's*, *supra*, at 1169. Notably, in drafting section 9658, Congress used similar wording as *Black's* when it defined "applicable limitations period," suggesting that Congress likewise made no distinction between "statutes of limitation" and "statutes of repose." *Compare id.* at 835, *with* 42 U.S.C. § 9658(b)(2) (defining "applicable limitations period" as the "period [during which actions] "may be brought").

Other contemporaneous dictionaries also defined "statute of limitations" to include all limitations periods and contained no separate definition for "repose" or "statute of repose." *See* Irving Shapiro, *The New Dictionary of Legal Terms* 216 (1984) (defining "statute of limitations" as "[l]egislative enactment limiting time within which specified action or prosecutions must be instituted" and containing no definition of repose); Steven H. Gifis, *Dictionary of Legal Terms* 412 (1983) (defining "statute of limitations" as "*any* law that fixes the time within which parties must take judicial action to enforce rights or else be thereafter barred from enforcing them" and containing no definition of repose) (emphasis added); Daniel Oran, *Oran's Dictionary of the Law* 250-51, 403 (1983) (defining "Limitation" with a cross-reference to that definition under "Statute of limitations" and containing no definition of repose); George Gordon Coughlin, *Dictionary of Law* 163 (1982) (defining "statute of limitations" as "[l]imits fixed by statutes as to the time within which lawsuits may be started" and containing no definition of repose). In contrast to these five dictionaries, CTS argues that one dictionary "distinguish[ed] statutes of limitation and statutes of repose." Pet. Br. 28. That dictionary, however, defined

"statute of repose" by noting that a "statute of repose" is "sometimes called hybrid *statute of limitations*." Wesley Gilmer, Jr., *The Law Dictionary* 309 (1986) (emphasis added).

Fifth, CTS has it backwards when arguing that "statute of repose" was historically an umbrella term encompassing statutes of limitation. Pet. Br. 18, 29, 45-47. This Court, for example, has used the term "statute of limitations" to describe repose provisions. *See, e.g.*, *Merck & Co. v. Reynolds*, 559 U.S. 663 (2010) (describing unqualified ban on securities claims five years after violation as part of "[t]he applicable statute of limitations"); *Lampf*, 501 U.S. at 362 n.8 (referring to three-year repose period as "a portion of an express statute of limitations"); *Ernst & Ernst*, 425 U.S. at 210 (referring to "statute of limitations" with discovery provision and three year absolute repose provision).

Many other courts have concluded specifically that statute of limitations is the broader term for limitations periods, with "statute of repose" a subcategory. *See Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) ("The majority of the case law treats repose periods as a subcategory of statute of limitations."), *petition for cert. filed*, U.S. Nov. 8, 2013 (No. 13-576); *Fed. Hous. Fin. Agency v. UBS Americas*, 712 F.3d 136, 143 (2d Cir. 2013) ("the courts—including the Supreme Court and this Court—have long used the term 'statute of limitations' to refer to statutes of repose"); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 190 (Fla. Dist. Ct. App. 1991) ("a statute of repose is a form of a statute of limitations"); *Witherspoon v. Sides Constr. Co.*, 362 N.W.2d 35, 41 (Neb. 1985) ("A

statute of repose is a type of a statute of limitations."). As CTS and the government acknowledge, a "statute of repose" is "[u]nlike an *ordinary statute of limitations*" (Pet. Br. 29 (emphasis added); U.S. Br. 27), further showing that "statute of repose" is a subset of the broader category of statutes of limitations. *See Nat'l Credit Union Admin. Bd.*, 727 F.3d at 1266.

The West "Key Number System" similarly reveals that "statute of limitations" is the umbrella term. Begun more than a century ago by the founder of West Publishing, the West "Key Number System" organizes the law into various topics—one could say umbrellas. Topic number 241 is "Limitation of Actions." Within the topic "Limitations of Actions" are five main subtopics. The first of the main subtopics is "Statutes of Limitation." There is no topic or subtopic for repose provisions. Case law rules regarding repose provisions are simply indexed under the topic "Limitation of Actions" and the subtopic "Statutes of Limitation."

Not to omit LexisNexis, in the index to the General Statutes of North Carolina, which LexisNexis publishes, the umbrella heading "Statute of Limitations" includes more than 260 subtopics, including "Repose, Statute of." *See* General Statutes of North Carolina, General Index J to Z, at 1227-34. Under "Statute of Repose," in contrast, are only 3 subtopics and a cross-reference to "Statute of limitations generally, See STATUTE OF LIMITATIONS." *Id.* at 1233. In short, "statute of limitations" has been the umbrella term, while "statute of repose" has been the narrower term.

II. SECTION 9658 IMPLIEDLY PREEMPTS NORTH CAROLINA'S REPOSE PROVISION.

Section 9658 also impliedly preempts North Carolina's repose provision because that provision "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001) (presence of express preemption provision did not prevent working of ordinary implied preemption principles).

A. The State provision poses an obstacle to CERCLA's purposes and objectives.

Section 9658 was enacted to prevent plaintiffs injured by exposure to hazardous substances released into the environment from a facility from being deprived of their day in court by state statutes that run before the plaintiffs discover the cause of their latent harm. H.R. Conf. Rep. No. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. As the study group recognized, that purpose can be frustrated by either a statute of limitations without a discovery rule or by a statute of repose. Moreover, the problem of plaintiffs being deprived of their day in court "is probably most likely to occur where statutes of repose operate." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008). As the court below observed, "Refusing to apply § 9658 to statutes of repose allows states to obliterate legitimate causes of action before they exist," which is "precisely the barrier that Congress intended § 9658 to address." Pet. App. 15a. "Doing so cannot be termed an honest attempt to 'effectuate Congress's intent'." *Id.*

A statute of limitations without a discovery rule and a "statute of repose" can have the exact "same effect" of barring plaintiffs' claims before they know they have them. Study Group Report at 241. Indeed, a statute of limitations without a discovery rule and a "statute of repose" can begin to run at the same time—when the defendant last acts or fails to act. The Study Group Report commissioned by Congress repeatedly expressed concern with the problem of latent harm from hazardous substances and the importance of a discovery rule. *See* Study Group Report at 8, 16-17, 28, 31, 55, 116, 240, 242, 244-45, A-3, B-1, L-17, L-20. And Congress agreed with the study group that individuals with latent harm from hazardous substances should not be deprived of relief by limitations periods that begin before they discover their harm. *See* H.R. Conf. Rep. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

"[D]iscovery rule[s] exist[] in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1222 (2013). In enacting section 9658, Congress responded to the study group's concern that claims based on latent harm from hazardous wastes released into the environment from a facility call for such a discovery rule. CTS does not disagree. Pet. Br. 52. Construing section 9658 to apply to limitations periods that include repose periods furthers this statutory purpose. Not only do repose provisions have the same effect as statutes of limitation without discovery rules,

they were enacted as a *reaction* to discovery rules. *Hinkle*, 85 F.3d at 302 ("probably all statutes of repose . . . are surgical strikes by the legislature against the discovery rule").

Uniform preemption of less favorable commencement dates is especially appropriate because hazardous wastes released into the environment can cross state lines, and victims of the same environmental release in neighboring states might be subject to differing commencement dates, with those in a state with a repose provision potentially barred before they even knew of their harm, depending on their forum state's choice of law rules. Uniformity is also appropriate because states might otherwise have an incentive to pass more restrictive provisions to compete for hazardous waste producers, further frustrating Congressional intent to provide victims of latent harm their day in court. In fact, the government made this very point in *Freier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002). *See* Brief for Intervenor United States, *Freier v. Trico Prods. Corp.*, Nos. 00-7724, 00-7728, 2000 WL 33996142, at *15 (2d Cir. Nov. 6, 2000) (hereafter "U.S. *Freier* Br.") ("A uniform limitations trigger . . . prevent[s] States from seeking to adjust this element of their law in order to attract investment."). Such competitive legislation would frustrate the statutory goal that responsible parties bear the costs of clean-up.

In *Freier*, the government, which intervened to support individual plaintiffs pursuing tort claims, argued that the "federally required commencement date" creates a "uniform trigger" that overrides earlier state commencement dates. *Id.* at 1, 15, 26-27. Further, the government noted that "it is difficult to jus-

tify insistence on rigid application of limitations laws to the personal injury and property damage claims affected by the [federally required commencement date]." *Id.* at 37. In light of CERCLA, any "reasonable expectation of repose State court defendants might have had has been altered already. . . . [and therefore] it seems anomalous to give defendants special protection from personal injury claims." *Id.*

Consistent with the government's argument in *Freier*, the court below relied in part on the remedial nature of CERCLA and the rule that remedial statutes are broadly construed. Pet. App. 14a-15a; *see Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987). Likewise, nearly every circuit has referred to the rule with approval in construing CERCLA. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996); *United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161, 185 (3d Cir. 2005); *Uniroyal Chem. Co., v. Deltech Corp.*, 160 F.3d 238, 242 (5th Cir. 1998); *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994); *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 707 n.5 (7th Cir. 1998); *United States v. Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989); *Hanford Downwinders Coalition, Inc., v. Dowdle*, 71 F.3d 1469, 1481 (9th Cir. 1995); *Colorado v. Idarado Mine Co.*, 916 F.2d 1486, 1492-93 (10th Cir. 1990); *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409 (11th Cir. 1996). *But see East Bay Mun. Util. Dist. v. U.S. Dept. of Commerce*, 142 F.2d 479, 484 (D.C. Cir. 1998) (questioning remedial statutes canon).

If ever a statute were "remedial," it is section 9658, which was enacted after Congress appointed the

study group to evaluate "barriers to recovery posed by existing statutes of limitations" and "address the need for revisions in existing statutory or common law." 42 U.S.C. §§ 9651(e)(3)(F), (e)(4)(A). The study group identified statutes of limitation that begin to run before latent harm is discovered as the primary barrier to recovery, and Congress acted to prevent plaintiffs with latent harm from being deprived of their day in court. Construing section 9658 not to preempt repose provisions would frustrate that remedial purpose. *See* Van R. Delhotal, *Re-examining CERCLA Section 309: Federal Preemption of State Limitations Periods*, 34 Washburn L.J. 415, 457 (1995) (section 9658 "must apply to statutes of repose as well as statutes of limitations. It simply defeats congressional intent to hold otherwise . . . .").

B. CTS and the government misread the legislative history.

CTS and the government misread the legislative history in several ways. First, they wrongly state that the Study Group Report "repeatedly distinguished between statutes of limitation and statutes of repose," made two separate recommendations regarding statutes of limitation and statutes of repose, and noted that North Carolina had adopted a statute of repose. Pet. Br. 33, 34; U.S. Br. 25, 26, 33. In fact, the Report used the term "statutes of repose" to describe repose provisions just once in more than 700 pages, on the single page cited by CTS as an "example." Pet. Br. 33 (citing Study Group Report at 241). There, the Report stated that "statutes of repose . . . in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows he has one." Study Group Report at 241. That statement

is indeed accurate because, as noted above, the period of both a statute of limitations without a discovery rule and a repose provision can run before a plaintiff is even aware of his harm.

In addition, while the Study Group Report twice summarized North Carolina's applicable statute of limitations, including its repose provision, it did not use the term "repose." Study Group Report at B9-10, B63. Instead, the Report included the North Carolina provision and similar repose provisions in other states in its analysis of "statutes of limitation" in the appendix entitled "Statutes of limitation applicable to actions arising out of hazardous waste disposal." *Id.* at B-1, B6-8 (summarizing Connecticut and Kansas statutes).

Reflecting the treatment of repose periods as provisions within state statutes of limitations, the Study Group Report made a single recommendation with respect to the period of time within which suit may be brought. In a subsection entitled "Statute of limitations," it recommended that:

> all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended to also cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff's claim before he knows that he has one.

Id. at 241. In response, Congress did not wait for the states to act. It enacted a provision mandating a federal discovery rule. That provision, section 9658, preempts all state limitations that provide a "com-

mencement date which is earlier than the federally required commencement date."

Finally, CTS and the government quote Representative Glickman out of context in arguing that section 9658 represents a legislative compromise against preemption of "substantive" law and tort damages. Pet. Br. 50; U.S. Br. 32. In the quoted passage, Representative Glickman was speaking out against an amendment that would have created a federal cause of action. *See* 131 Cong. Rec. 35647 (Dec. 10, 1985). As to section 9658 preemption of state limitations periods, however, Representative Glickman *supported* a uniform discovery rule in cases of latent harm from exposure to hazardous substances, stating:

> [C]urrently residents of some States have no right to sue for damages arising from hazardous substances because the State statute of limitations applicable to their claim has already passed before they even know they have been injured.
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> . . .
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> [U]nder this provision, *all persons, regardless of which State they live in, will be able to sue for damages when they know they have been damaged*. This is of particular importance because of the long latency period for many injuries resulting from exposure to hazardous substances.
>
> . . .

Id. at 35640 (emphasis added). Similarly, Representative Snyder noted with approval section 9658's "uniform approach . . . requiring that the State's statute may not begin" until discovery. *Id.* at 35644.

In short, Congress intended to preserve state law causes of action for personal injury or property damages from hazardous wastes released into the environment from a facility until plaintiffs had discovered the cause of their harm. Construing section 9658 not to override North Carolina's repose provision would frustrate that intent.

III. CTS'S COUNTERARGUMENTS ARE UNPERSUASIVE.

CTS and the government make several additional arguments to support their view that section 9658 does not apply to state repose provisions. All are meritless.

First, CTS invokes the presumption against preemption. To begin with, where, as here, the scope of preemption is clear from the statutory language, the Court has not looked to the presumption. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004). Further, the presumption has no place where the preemption of state law (repose periods) will allow another state law (common-law claims) to be given effect.

Moreover, although the North Carolina repose provision concerns an area traditionally within a state's historic police powers (the period during which state-law claims may be brought), that traditional state authority gives way when Congress enacts a "comprehensive federal program" that displaces state authority as to the subject of that program. *See Arizona v. United States*, 132 S. Ct. 2492, 2503-04 (2012) (traditional state authority to regulate employment relationship displaced by comprehensive federal immigration legislation); *Wisconsin Dep't of Indus., La-*

bor & Human Relations v. Gould Inc., 475 U.S. 282, 287-88 (1986) (state's power to control spending of its own funds preempted when used to interfere with federal "comprehensive regulation of industrial relations"). CERCLA is such a "comprehensive federal program." As the government has previously argued, section 9658's "federally required commencement date" is "integral" to this comprehensive federal program, "because it is closely linked to CERCLA's other provisions addressing and preventing harms resulting from exposure to hazardous materials." U.S. *Freier* Br. 21. A state's interest in protecting defendants from older claims is overcome in this instance:

> The countervailing State interest in protecting potential defendants is substantially weaker. Not only do such commercial entities operate in an area that is already heavily regulated, but they are also subject to CERCLA's provisions imposing liability for cleanup costs and natural resources damages irrespective of when the activity that render them liable occurred. Those provisions embody a Congressional decision that places great importance on ensuring that these costs are paid, and that can apply to acts that occurred many decades in the past. . . . To the extent that they may be inconvenienced by such suits, Congress has already made a judgment in CERCLA that a defendant's interest in repose, and the presumptions of tort law that often leave costs where they fall, are less important than the need to spread the social costs associated with the harms resulting from hazardous materials, and to internalize those costs to the responsible industries.

Id. at 36 (citations omitted).

Second, invoking the avoidance canon, CTS argues that section "9658 would raise serious constitutional doubts if it were construed to force states to impose substantive tort liability as a matter of state law" because it would essentially "compel[] state legislatures to enact tort causes of action." Pet. Br. 37, 38. This argument, which was neither raised nor decided below, has been waived. *See United States v. Appel*, 134 S. Ct. 1144, 1153 (2014) (declining to reach constitutional questions not reached below and First Amendment objections presented "as a statutory interpretation argument based on constitutional avoidance"). It is also meritless.

CTS agrees that section 9658 preempts state statutes of limitations such as North Carolina's three-year period for bringing an action after discovery, but it argues that preempting "statutes of limitations" raises no concerns because those periods are "procedural" while "statutes of repose" are "substantive." Pet. Br. 40-41. That distinction cannot make a difference here, however, as the Court has on many occasions read federal law to preempt state substantive law, without suggesting the sort of constitutional conundrum posed by CTS. *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Riegel*, 552 U.S. 312.

Further, the avoidance canon "does not apply unless there are 'serious concerns about the statute's constitutionality.'" *Gonzalez v. United States*, 553 U.S. 242, 251 (2008) (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002)). This case presents no such concerns. The federally required commencement date is "an 'ordinary instance' of federal preemption of

State law," U.S. *Freier* Br. 25-27, as it has been established for over a century that Congress may alter state limitations periods. *Id.* at 27-33. And there is no merit to CTS's suggestion (Pet. Br. 40) that preemption is a sort of one-way street entitled to more deference when Congress "negates" state substantive law rather than enlarging it. *Id.* at 25 ("Although the displacement of State law through federal preemption is most often thought of as involving the constriction of State remedies, preemption in fact routinely has the effect of expanding those remedies.").

As the Second Circuit explained in rejecting a "commandeering" argument very similar to CTS's:

> Simply put, the Tenth Amendment does not prevent the application of federal law in state courts even though "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," because "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States*, 505 U.S. [144,] 178–79 [1992]. The [federally required commencement date], which requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim, does not violate the Tenth Amendment.

Freier, 303 F.3d at 205.

Third, CTS raises the specter of excessive preemption of state repose provisions. *See* Pet. Br. 53 (the effect of the Fourth Circuit's reading is that "*every* state statute of repose – no matter how reasonable, no matter how minimally burdensome to plaintiffs – is

preempted") (emphasis in original); *see also* Am. Chem. Council Br. 6. This floodgates argument is easily dismissed.

Section 9658 by its plain terms can apply only when there has been a "release" into the "environment" of a covered "hazardous substance" from a "facility." 42 U.S.C. 9658(a)(1). While the brief of the American Chemistry Council (at 15-16) discusses only one of these four prerequisites (hazardous substances), all four prerequisites must be present for section 9658(a)(1) to apply. *See First United Methodist Church v. United States Gypsum*, 882 F.2d 862, 867 & n.6 (4th Cir. 1989) (section 9658 preemption inapplicable to claims for cost of removing asbestos from the structure of a building, where asbestos created a hazard only within that building); *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988) (section 9658 preemption inapplicable because the interior of a place of employment is not the "environment" so as to satisfy the "into the environment" requirement); *Greco v. United Techs. Corp.*, 890 A.2d 1269, 1281-86 (Conn. 2006) (plaintiffs' allegations of contamination did not meet the requirement of a release into the "environment"); *Morgan v. Exxon Corp.*, 869 So. 2d 446, 449-52 (Ala. 2003) (section 9658 inapplicable because plaintiffs failed to satisfy hazardous substances element).

Moreover, Respondents are not aware of a single state with a repose provision that specifically bars latent harm from environmental contamination. *Cf.* Alaska Stat. § 09.10.055(b)(1)(A) (ten-year statute of repose does not apply if personal injury, death, or property damage resulted from prolonged exposure to hazardous waste); Conn. Gen. Stat. § 52-577c(b) (limi-

tations period for actions for personal injury or property damage caused by exposure to hazardous chemicals released into the environment runs from discovery of harm). The question presented here will thus affect only the few states with general repose provisions or common law rules of repose applicable to all personal injury or property damage claims. *See* Conn. Gen. Stat. §§ 52-577, 52-584[1]; Kan. Stat. Ann. § 60-513(b); N.C. Gen. Stat. § 1-52(16); Or. Rev. Stat. § 12.115; *see also Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225 (S.D. Ala. 2009) (discussing Alabama's twenty-year common law rule of repose and holding that section 9658 preempts it).

Fourth, the government argues that Congress did not intend CERCLA's "remedial focus" to extend to tort damages. U.S. Br. 32-33. CERCLA's plain language refutes this argument. Section 9658 applies to "any action brought under State law *for personal injury, or property damages*." 42 U.S.C. § 9658(a)(1) (emphasis added). In addition, in section 9658's statutory history, Congress directed the study group to evaluate "the adequacy of existing common law and statutory remedies in providing *legal redress for harm to man and the environment*." *Id.* § 9651(e)(1) (emphasis added). The study group in turn noted the availability of remedies for personal injury and property damage under state law claims for nuisance, trespass, negligence, and strict liability. Study Group

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[1] Connecticut appellate courts have not addressed whether section 52-577c(b)'s discovery rule for hazardous waste cases controls over sections 52-577 and 52-584, which begin to run at the defendant's last act or omission. *See Taska v. ACMAT Corp.*, No. CV 09 5024323, 2012 WL 1959233, at *4 (Conn. Super. Ct. May 7, 2012). *See also Durham Mfg.*, 294 F. Supp. 2d at 278.

Report at 27, 52, 80. The study group even noted that the government might be liable under the Federal Tort Claims Act if it owned the disposal site or waste and its employees or agents committed a tort. *Id.* at 59. Thus, CERCLA section 9658 was very intentionally directed at extending the period for filing tort actions based on harm from hazardous waste, as part of Congress's effort to remedy the problems caused by such environmental hazards.

In addition, in *Freier*, the government took the opposite position and successfully argued that section 9658 supports tort damages. *See* U.S. *Freier* Br. 1, 7, 11-16, 19 n.8, 21-22, 37. As the government stated, that case "involve[d] a range of tort claims under New York law for injuries or deaths allegedly caused by exposure to toxic substances." *Id.* at 7. After intervening on behalf of the plaintiffs, the government explained:

> [T]ort damages have a well-understood deterrent function. In enacting the FRCD provision, Congress found that tort actions seeking compensation for injuries caused by such wastes often were impeded by restrictive State limitations periods. By altering these limitations periods, the FRCD serves to deter future acts of improper hazardous waste disposal by commercial entities. . . .

Id. at 13. The government further observed that "the payment of compensation for those harms can have substantial economic effects, for instance by permitting plaintiffs to pay for medical bills or other necessary costs." *Id.* at 19 n.8.

> CERCLA does more than merely address cleanup of waste sites and allocation of costs of those cleanups. . . .

> . . .
>
> . . . Not only does the deterrent effect of tort actions reduce the likelihood of future injury, payment of compensation can benefit human health immediately by allowing the injured to pay for necessary medical care. The FRCD also applies to claims for harm to property; in this respect, it complements the provisions of CERCLA directed at cleaning up contaminated sites.

Id. at 21-22.

Finally, amicus DRI proposes that individuals such as Respondents "can remove or remediate contamination and then file a private cost-recovery action." DRI Br. 14 n.3. Expecting individual homeowners in the Blue Ridge Mountains community of Skyland, North Carolina to remove or remediate the contamination themselves is ludicrous. Even if they had the wherewithal to do so, they would have to trespass, as the source of the contamination is not on their own land. And then afterward, they would still have to go to court, as DRI acknowledges. *Id.* There is no suggestion in the statutory text or history that Congress envisioned that the burden of hazardous waste clean-up would fall in the first instance on the individuals harmed by the waste. *See also Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (CERCLA was designed to ensure parties responsible for the contamination would bear costs of clean-up).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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